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Case No. 87-5002

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1986

STATE OF WISCONSIN, ex rel.
ELLIS T. McCOY,

Appellant,

v.

WISCONSIN COURT OF APPEALS,
DISTRICT I,

Appellee.

ON APPEAL FROM
THE SUPREME COURT OF WISCONSIN

MOTION TO DISMISS APPEAL
Or, in the Alternative
TO AFFIRM JUDGMENT

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MOTION TO DISMISS APPEAL
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Pursuant to Rule 16, paragraphs 1(a) and (c) of the Rules of this Court, the appellee moves that this appeal be dismissed, on the ground of lack of jurisdiction in this Court; or, alternatively, that the judgment of the Supreme Court of Wisconsin (hereinafter "Wis. Sp. Ct.") appealed from herein be

affirmed, on the ground that it is manifest that the question on which the decision of the cause depends is so unsubstantial as not to need further argument.

CLAIMED JURISDICTION

This is a direct appeal from a final judgment of the Wis. Sp. Ct., the highest court of Wisconsin, with the claimed jurisdiction for the entertaining of such appeal being under 28 U.S.C. § 1257(2) (1966). See Jurisdictional Statement, p. 3.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULE INVOLVED

The constitutional provisions here involved are:

(a) That part of the Sixth Amendment to the United States Constitution which reads: "In all criminal prosecutions, the accused shall enjoy the right

. . . to have the Assistance of Counsel for his defence."

(b) That part of the Fourteenth Amendment to the United States Constitution which reads ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . ."

(c) That part of article I, section 7, Wisconsin Constitution, which reads "In all criminal prosecutions the accused shall enjoy the right to be heard by . . . counsel; . . ."

(d) Article I, section 1, Wisconsin Constitution, which reads: "All people are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness; to secure these rights, governments are instituted, deriving their just powers from the consent of the governed."

The statute here invclved is that part of 28 U.S.C. § 1257 (1966) (hereinafter "§ 1257(2)") which reads as follows:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> . . . .
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, . . . of the United States, and the decision is in favor of its validity.

(Emphasis supplied.)

A second statute here involved is that part of sec. 751.12, Wis. Stats., which reads, "The state supreme court shall, by rules promulgated by it from time to time, regulate pleading, practice and procedure in judicial proceedings in all courts . . . ."

The rule here involved is Rule 809.32(1), Wisconsin Rules of Appellate Procedure, promulgated by the Wis. Sp. Ct., and hereinafter called "sec. 809.32(1)." It reads:

> If an attorney appointed under s. 809.30 or ch. 977 is of the opinion that further appellate proceedings on behalf of the defendant would be frivolous and without any arguable merit within the meaning of Anders v. California, 386 U.S. 738 (1967), the attorney shall file with the court of appeals 3 copies of a brief in which is stated anything in the record that might arguably support the appeal and a discussion of why the issue lacks merit. The attorney shall serve a copy of the brief on the defendant and shall file a statement in the court of appeals that service has been made upon the defendant. The defendant may file a response to the brief within 30 days of service.

(Emphasis supplied.)

QUESTIONS PRESENTED

(1) Does jurisdiction exist for the entertaining of this appeal, where there was drawn in question in the Wis. Sp. Ct. the validity of a procedural, appellate rule of such court, on the ground of its alleged repugnancy to the United States Constitution, and the decision was in favor of its validity?

(2) If this Court should conclude it has jurisdiction over this appeal, should the judgment appealed from be affirmed on the ground that the question on which the decision in the cause depends is so unsubstantial so as to need no further argument?

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STATEMENT

In the Wis. Sp. Ct., appellant attacked as violative of the United States and Wisconsin Constitutions that portion of sec. 809.32(1) which requires the attorney therein described[1], who is of the opinion therein described, to include in the brief required by sec. 809.32(1) "a discussion of why the issue lacks merit," following the statement in such brief of "anything in the record that might arguably support the appeal."

In the Wis. Sp. Ct., appellant argued, both in his initial and reply brief, that sec. 809.32(1) "deprives relator of due process and effective assistance of counsel on appeal" insofar as it requires appellate counsel "to

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[1]Such attorney, hereinafter called "the defender," represents an indigent defendant at State expense.

provide the court with reasons why the appeal lacks merit." See Appendix pp. 101, 103, infra. Such Court held, however, "that adherence to sec. 809.32(1), Stats., does not operate to deprive defendant of any of his constitutional rights . . . ." See Appendix, p. 107, infra.

From the judgment containing such holding rendered on April 9, 1987, this appeal has been taken, with jurisdiction for this Court to entertain it claimed under § 1257(2).

ARGUMENT

I. THIS APPEAL SHOULD BE DISMISSED ON THE GROUND OF LACK OF JURISDICTION IN THIS COURT, FOR THE REASONS SHOWN BELOW.

As above shown, an appeal taken under § 1257(2) is from a final judgment or decree "rendered by the highest court

of a State in which a decision could be had," where there is "drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution . . . of the United States, and the decision is in favor of its validity." (Emphasis supplied.)

The appellee submits that sec. 809.32(1) does not come within the compass of the words "a statute of any state" as employed in § 1257(2), so that the jurisdiction claimed herein for this appeal does not exist.

Appellant cites eight cases[2], Federal and state, as supporting his jurisdictional claim herein. Jurisdictional Statement, p. 3. In so doing, he accords pride of place to Lathrop v. Donohue, 367 U.S. 820 (1961) (hereinafter "Lathrop"), a case of Wisconsin provenance. At first blush, Lathrop appears somewhat supportive of such

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[2]Of such eight cases, two, Williams v. Bruffy, 96 U.S. 176, 183 (1877) and Reinman v. Little Rock, 237 U.S. 171, 176 (1915) merely stand for the principle that within the meaning of § 1257(2) any "enactment," from "whatever source originating, to which a state gives the force of law" is "a statute of the state." King Mfg. Co. v. Augusta, 277 U.S. 100, 102-05 (1928) is helpful in that it clearly shows that "enactment" as referred to in such principle refers to an exercise of legislative power only, and in its statement that, "It of course rests with each state to determine in what form and in what agencies its legislative power may be exerted." 277 U.S. at 103. Of the five remaining cases, only Lathrop v. Donohue, 367 U.S. 820 (1961), discussed in argument herein, has any real relevancy with respect to the jurisdictional issue in question.

claim; but upon close scrutiny, and viewed in conjunction with certain Wisconsin case law, it is submitted that Lathrop assists materially in showing that this Court lacks jurisdiction herein.

In Lathrop, the jurisdictional question was whether this Court had jurisdiction under § 1257(2) over an appeal from a decision of the Wis. Sp. Ct. which upheld against constitutional attacks an order of such court which had integrated the Wisconsin State Bar by creating such bar "under Rules and Bylaws promulgated by the court." 367 U.S. at 821. In its jurisdictional holding in Lathrop, this Court said, inter alia,

> We are satisfied that this appeal is from an act legislative in nature and within § 1257(2). Integration of the Bar was effected through an interplay of action by the legislature and the court directed to fashioning a policy

> for the organization of the legal profession. The Wisconsin Legislature initiated the movement for integration of the Bar in 1943 when it passed the statute, chapter 345 of the Wisconsin Laws for that year, . . .

(Emphasis supplied; 367 U.S. at 825.) It then went on to point out that despite such legislative initiative, the Wis. Sp. Ct. "twice refused to order integration" (id., at 825-26), and further stated, "Nevertheless, the court in rejecting the first petition . . . recognized that its exercise of the power to order integration of the Bar would not be adjudicatory, but an action in accord with and in implementation of the legislative declaration of public policy.[3] . . ." (Footnote omitted; emphasis supplied; id. at 826.)

These key aspects of this Court's jurisdictional holding in Lathrop show great weight and deference accorded to

the recognition by the Wis. Sp. Ct. that its adoption of the rule there involved "would not be adjudicatory," but essentially legislative; and also shows this Court viewing as important to such holding that, "[i]ntegration . . . was effected through an interplay of action by the legislature and the court . . . ." Here, however, no such interplay produced the appellate, procedural rule in question. Moreover, State v. Holmes, 106 Wis. 2d 31, 44, 45, 315 N.W.2d 703 (1982) shows the Wis. Sp. Ct. clearly taking the position that in regulating, among other things, "practice and procedure" in the courts, it has acted "in the exercise of

its judicial power . . . ."[3] (Emphasis supplied; 106 Wis. 2d at 45.) Appellee assumes, on the basis of the deference shown by this Court in Lathrop to the judgment of the Wis. Sp. Ct. as to the non-judicial character of its order there involved, that this Court will accord the same deference to the recognition by such court, in State v. Holmes, supra, that when it adopts a procedural rule of the kind here in question, it exercises a

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[3]It is perhaps noteworthy that Wisconsin case law has long recognized that at the time of the adoption of the state constitution (1848) the power to regulate procedure in the courts "was considered to be essentially a judicial power, or at least not a strictly legislative power, . . ." Rules of Court Case, 204 Wis. 501, 510, 236 N.W. 717 (1931). See also Mosing v. Hagen, 33 Wis. 2d 636, 148 N.W.2d 93 (1967); In Matter of E.B., 111 Wis. 2d 175, 183, 330 N.W.2d 584 (1983). Today, however, as clearly recognized in State v. Holmes, the power of the Wis. Sp. Ct. to regulate practice and procedure is properly viewed as a purely judicial power.

judicial power, not a legislative one. If this Court accords such deference, it should, it is submitted, ineluctably follow that it would hold that it has no jurisdiction herein, under § 1257(2). As stated in Lathrop, "Under that section [§ 1257(2)], the legislative character of challenged state action . . . is decisive of the question of jurisdiction" (bracketed material supplied; 367 U.S. at 824); and here, appellee submits, the rule in question was promulgated by the Wis. Sp. Ct., in its own view and in any logical view, in an exercise of its judicial power.

In closing this argument, it must be noted that the judicial power of the Wis. Sp. Ct. to adopt a rule of the kind in question has long been codified, with such power now described in sec. 751.12, Wis. Stats. That such power, however,

has been so codified does not show it to be a legislative power. The Wis. Sp. Ct. in Rules of Court Case, supra, 204 Wis. at 503-10, rejected what it described as "the principal attack upon the validity of" sec. 251.18, Wis. Stats., a predecessor statute of sec. 751.12 "which was that such statute constituted a delegation by the legislature of its legislative power." What the procedural rule-making power recognized in sec. 751.12 is, of course, is one of those judicial powers, described as "incidental, implied, or inherent," which powers would and do exist in the Wis. Sp. Ct., regardless of whether they are codified. See State v. Holmes, 106 Wis. 2d at 44.

II. SHOULD THIS COURT CONCLUDE IT HAS JURISDICTION OVER THIS APPEAL, THE JUDGMENT APPEALED FROM SHOULD BE AFFIRMED ON THE GROUND THAT THE QUESTION ON WHICH THE DECISION IN THE CAUSE DEPENDS IS SO UNSUBSTANTIAL AS TO NEED NO FURTHER ARGUMENT.

Appellee submits that the question on which the decision of this cause depends is so unsubstantial, for several reasons, as to require no further argument herein, therefore warranting a summary affirmance of the judgment here involved.

The above-mentioned question is this: does the requirement of sec. 809.32(1) that a so-called "no merit" report or brief contain "a discussion of why the issue lacks merit" deprive the defendant referred to in such rule of any of his constitutional rights, including that of right to counsel under the Sixth Amendment, United States Constitution?

The first of the several reasons above mentioned, supporting summary affirmance of the judgment appealed from, is that Anders v. California, 386 U.S. 738 (1967), on which appellant placed his chief reliance in the Wis. Sp. Ct. (see p. 4, App. A to Jurisdictional Statement) clearly does not prohibit the above-mentioned "discussion" requirement of sec. 809.32(1), either expressly or by implication. The significant absence of such prohibition in Anders was noted by the Wis. Sp. Ct. See p. 8, App. A to Jurisdictional Statement.

The second of such reasons is that the decided weight of authority supports the holding of the Wis. Sp. Ct. that the "discussion" rule requirement here in question violates no constitutional right of the defendant in the criminal case wherein the defender files a "no merit"

brief subject to such requirement. Such weight of authority consists of the following: United States v. Edwards, 777 F.2d 364, 365 (7th Cir. 1985); Commonwealth v. Moffett, Mass., 418 N.E.2d 585, 592 (1981); Com. v. McClendon, 434 A.2d 1185, 1187-88 (S. Ct. of Pa. 1981); and State v. McKenney, 568 P.2d 1213, 98 Idaho 551 (1977). Against this array of cases, appellant can cite contra only Robinson v. Black, 812 F.2d 1084 (8th Cir. 1987).

To the cases supplying the weight of authority above shown, still another case may be added, namely, Suggs v. United States, 391 F.2d 971 (D.C. Cir. 1968). Such case first condemned as "not constitutionally adequate" a brief which was apparently a brief on the merits submitted by a defender on appeal, and not a "no merit" brief. It is clear that

such condemnation was grounded on the fact that such brief contained a "discussion", the "manifest thrust" of which was to show that there was "no substance" in the arguments of the defendant-appellant. 391 F.2d at 972. With this fact obviously in mind, the Court stated, ". . . with the instruction provided by Anders it is manifest that a brief like that filed by counsel in this case is not constitutionally adequate, even though the court purports to review the record independently. Counsel may not 'brief his case against his client.'" Id. at 973. Then turning, however, to the defender's "motion for leave to withdraw", the Court in Suggs concluded that such motion should be granted because the appeal brief in question "was transmitted to the Government, and indeed adopted by the

Government" (id. at 974); but in so doing, in a holding supportive of the "discussion" requirement here in question, it noted that in its "Statement for Counsel" it had "provided for an amicus memorandum,"[4] with express instructions to counsel, however, that such memorandum "should be available only to the court" (emphasis supplied; id.). The clear implication, then, of Suggs is that had the defender's brief on the merits therein, viewed as and serving as the

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[4]The description of such "amicus memorandum", which was required to be submitted to the court where an attorney had concluded that there was no non-frivolous issue, and moved to withdraw, was that it was "'a supporting memorandum analyzing the case legally, citing record references to the transcript if one is available and also citing any case or cases upon which counsel relied in arriving at his ultimate conclusion.'" 391 F.2d at 974. Obviously, such amicus memorandum would, inter alia, meet the "discussion" requirement of sec. 809.32(1).

required "amicus memorandum," been tendered only to the court, nothing constitutionally objectionable would have occurred. This implied holding, it is submitted, places Suggs among those cases which are supportive of the "discussion" requirement here involved.

The third of the reasons above-mentioned, enjoying parity with those two above discussed, is this: that the "discussion" requirement of sec. 809.32(1), and the meeting thereof, do not disserve the interests of the defendant referred to in such rule, but instead render valuable service to such interests in several ways. Where a defender provides such "discussion", both to the Wisconsin Court of Appeals and to the defendant, as required by sec. 809.32(1), it is submitted that he assists the defendant by way of advice in

two ways: first, the providing of such "discussion" does not bewilder, frustrate, and alienate the defendant by presenting him with a "no merit" brief taking what has been so aptly termed a "Janus-faced approach,"[5] i.e., stating that the defender believes an appeal would be frivolous and without any arguable merit, but then going on to point out a matter or matters in the record which might arguably support the appeal, without then explaining to the defendant and to the Court of Appeals "why the issue lacks merit"; and second, and of equal importance to the defendant, because the presentation of such "discussion", insofar as it is made to the Court of Appeals, assists the

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[5]As to this, see Commonwealth v. Moffett, Mass., cited supra, 418 N.E.2d at 590.

defendant by means of advice because it provides such court with a clear showing that the defender has made an examination and evaluation of the matter or matters which might arguably support the appeal, and is not seeking to withdraw from representation of the defendant on appeal without having provided him with what has been described as "the kind of professional evaluation of his appeal which competent retained counsel would have provided to his client." Nickols v. Gagnon, 454 F.2d 467, 472 (7th Cir. 1971). "Held to the same standards of competence and integrity as a private lawyer" (Polk County v. Dodson, 454 U.S. 312, 321 (1981)), the defender, in meeting the "discussion" requirement of sec. 809.32(1), Stats., is also complying with such standards, in the form of

advocacy then suitably and appreciably serving the needs of the defendant.

In closing this argument, two matters are worthy of note. They are:

(1) Where a defender is of the opinion that an appeal, in the language of sec. 809.32(1), "would be frivolous and without any arguable merit," then, it is submitted, his role as advocate for the defendant continues, but shifts in character from that of an argument-presenter to that of the attorney providing assistance by way of helpful advice; and such assistance logically and necessarily entails the presentation of the "discussion" required by sec. 809.32(1), which serves the interests of the defendant in the ways above shown.

(2) It is true, of course, that the defender, in providing the "discussion" required under sec. 809.32(1), has

obviously and necessarily engaged in a personal evaluation of "anything in the record that might arguably support the appeal," and has concluded that such matter or matters "lack merit." Such evaluation, however, necessarily made in providing the required "discussion," is under Anders manifestly not binding on the Court of Appeals, which has the exclusive power and duty to decide "whether the case is wholly frivolous." The defender, providing the mere "discussion" required by sec. 809.32(1), plainly does not seek to, and does not, intrude upon such exclusive judicial power and duty, which, under Anders, is exercised only "after a full examination of all the proceedings" by the court receiving the no merit brief. See Anders, 386 U.S. at 744.

CONCLUSION

For the reasons shown in Argument I, supra, the above stated motion to dismiss appeal should be granted; but should this Court conclude it has jurisdiction over this appeal, then the motion to affirm judgment above stated should be granted, for the reasons shown in Argument II, supra.

Respectfully submitted,

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APPENDIX OF APPELLEE
TO MOTION TO DISMISS APPEAL
Or, in the Alternative
TO AFFIRM JUDGMENT

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Appendix

P. 5, Brief and Appendix of Petitioner, filed in Wis. Sp. Ct. in Case No. 86-0172-W, wherein judgment appealed from herein was entered 101

P. 2, Reply Brief of Petitioner, filed in the above-mentioned Case No. 86-0172-W 102

Portion of judgment appealed from herein, consisting of p. 103 from such judgment as reported in 137 Wis. 2d 90-108, such judgment being rendered in St. ex rel. McCoy v. Appeals Ct. 103

granted the petition, insofar as it seeks a declaratory judgment with respect to the constitutionality of Rule 809.32(1) in an order dated March 27, 1986 (App. 137-138). The court also held the petition for a supervisory writ of prohibition in abeyance pending further order of the court (App. 138).

Further facts will appear in the argument.

ARGUMENT

RULE 809.32(1) DEPRIVES RELATOR OF DUE PROCESS AND EFFECTIVE ASSISTANCE OF COUNSEL ON APPEAL INSOFAR AS IT REQUIRES APPELLATE COUNSEL TO PROVIDE THE COURT WITH REASONS WHY THE APPEAL LACKS MERIT.

A defendant's right to counsel in a criminal case is guaranteed by the sixth amendment to the United States Constitution and Art. I, sec. 7 of the Wisconsin Constitution. This right to counsel includes the right to effective

representation of counsel. Powell v. Alabama, 287 U.S. 45, 53 (1932), State v. Koller, 87 Wis. 2d 253, 260-61, 274 N.W.2d 651 (1979).

The United States Supreme Court recently reaffirmed that if a state has created appellate courts as "an integral part of the . . . system for finally adjudicating the guilt or innocence of a defendant," the procedures used in deciding appeals must comport with the demands of the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Evitts v. Lucey, 469 U.S. ___, 83 L.Ed. 2d 821, 827 (1985). See also Griffin v. Illinois, 351 U.S. 12, 18 (1956). The court also

(1967). Respondent's brief at p. 3-4. Yet, nowhere in Respondent's brief does respondent indicate why the no merit brief previously filed was not in compliance with Anders. Petitioner submits that the statement of facts contained in his brief is entirely accurate, and that Respondents' objection lacks merit.

ARGUMENT

RULE 809.32(1) DEPRIVES RELATOR OF DUE PROCESS AND EFFECTIVE ASSISTANCE OF COUNSEL ON APPEAL INSOFAR AS IT REQUIRES APPELLATE COUNSEL ON APPEAL TO PROVIDE THE COURT WITH REASONS WHY THE APPEAL LACKS MERIT.

The most notable thing about Respondent's brief is what is not contained therein. Respondent has attacked Petitioner's brief because it takes the position that it is contrary to Anders to inform the court why the issues lack merit in a no merit report. What is

strikingly absent from Respondent's brief is precisely where the United States Supreme Court in Anders requires defense counsel to provide such reasons. A review of Anders indicates that no such requirement was specified in that case, nor is it specifically allowed. 386 U.S. at 744. Thus, the entire premise relied upon by Respondent is lacking. Indeed, this court has even recognized that the procedure adopted in Wisconsin does not strickly adhere to Anders, but is instead a modification of the Anders procedure. State v. Mosely, 102 Wis. 2d 636, 660, 307 N.W.2d 200 (1981).

Respondent's position only has merit if, in the absence of language requiring or allowing defense counsel to provide reasons why a case lacks merit, Anders allows appellate counsel to evaluate the merits of the case for the court as

opposed to evaluating the merits for the client. As petitioner has pointed out in his brief-in-chief at pp. 6-7, the Court in Anders ruled that that job is for the court, not counsel. 386 U.S. at 744.

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A final consideration which we believe is important to our decision is one which has been alluded to already, namely, the discussion requirement serves as a significant administrative aid to the reviewing court. It first provides a basis for the reviewing court to judge whether an appeal is meritorious. The brief in support of appeal, combined with the "no-merit" discussion, gives the court far more than just a "cold record" to look at; rather, the court has before it both the arguments in support of an appeal and a statement which at least refers to case authorities or factual references which do not support an appeal. Thus, the court has a substantial base of authority to refer to

in making its own, independent evaluation of the case. This makes it less likely that the court will overlook important legal authorities which would either support or militate against continued appellate proceedings. Hence, the discussion requirement operates as a judicial aid, serves an informational function and, equally important, enables the court to operate in a more efficient, expeditious and cost-saving manner. With an increase in the number of criminal appeals, this concern should be obvious.

Because we find that adherence to sec. 809.32(1), Stats., does not operate to deprive defendant of any of his constitutional rights, and given the other significant considerations we have enumerated, we affirm the constitutionality of the Wisconsin procedure.

Therefore, the petition for a supervisory writ of prohibition is denied.

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lack of concern in the client's cause. Nor can that fact be assigned as a reason for concluding that the client did not receive this constitutionally protected right of representation." 495 Pa. at 473-74, 434 A.2d at 1188.